IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 171 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DHRUV CO-OPERATIVE CREDIT SOCIETY LTD.
Versus
DEEPAKBHAI CHANDUBHAI MISTRI & OTHERS

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Appearance :
MS SHAHEEN KURESHI for MR MM TIRMIZI for Appellant.
MR SANJAY M AMIN for respondents 1 - 2.
MS SANGEETA PAHWA OF M/S THAKKAR ASSOC. for respondents 3 - 4.
NOTICE SERVED for Defendant(s) : 5,
MR NAYAN PARIKH for MR. AJ YAGNIK for respondent 6

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 01/11/2006

ORAL JUDGMENT

1. Admit. With the consent of parties, this matter is heard and finally disposed of today.

2. The appellant is original defendant No. 2 of Civil Suit No. 1147 of 2003 filed by respondents No. 1 and 2 herein before the City Civil Court, Ahmedabad. The appellant is a Co-Operative Credit Society [for brevity, the “Society', hereinafter]. The appellant Society has advanced a loan to one Jitendra P. Gajjar, Urvashiben Jitendra bhai Gajjar and Ashokbhai Prahladbhai Gajjar by taking into mortgage flat No. 301, 402 and 403 developed by Ninad Trading Association. It seems that the said Jitendra P. Gajjar had undertaken the work of development of property in the name of Ninad Trading Association. Since the said Jitendra Gajjar, who was also doing business in the name of Sagar Consultancy, has not paid up the loan amount, the appellant Society initiated proceedings for recovery of the amount by attaching and selling the property of the said Jitendra Gajjar. The appellant Society, thereafter proceeded to auction the property by taking recourse under the Bombay Land Revenue Code. The property in question, i.e. flat No. 301 belonging to Ninad Trading Association, was taken into attachment as share certificate was granted by the said non-Trading Association in the name of Jitendra Gajjar. In order to recover the dues, the appellant Society

tried to auction the property and at that stage, the present respondent No. 1 and 2 herein instituted Civil Suit No. 1147 of 2003 in the City Civil Court at Ahmedabad. The case of plaintiffs, present respondents No. 1 and 2 in the aforesaid suit is that the plaintiffs have purchased the aforesaid flat from defendant No.1, i.e. Jitendra Gajjar i.e. owner of Sagar Consultancy, who according to the plaintiffs, is developer of Ninad Non-Trading Association. It is the case of the plaintiffs that the plaintiffs have paid full consideration of the flat to defendant No.1, i.e. Jitendra Gajjar, who is the owner of Sagar Consultancy, and accordingly, the plaintiffs have become owners of the said flat. It is also the case of the plaintiffs that defendant No.1 has also, after taking money, issued allotment letter and possession letter to the plaintiffs and defendant No. 1 has also given share certificate to the plaintiffs. It is the case of the plaintiffs that defendant No. 2 [present appellant herein] has no right to auction the flat in question in order to recover its dues from defendant No.1. It is also the case of the plaintiffs that the flat in question was not subjected to any charge or was not mortgaged by the original owner i.e. Jitendra Gajjar when he sold the flat to plaintiffs. In the aforesaid suit, the plaintiffs have applied for interim injunction to the effect that the defendant No.2 may be restrained from auctioning the said flat during the pendency of the said suit. The learned trial Judge, after hearing the concerned advocates, found that there appears to

be collusion between the plaintiffs and the original defendant No.1 and 5 i.e. between the plaintiffs and Jitendra Gajjar as well as Ninad Non-Trading Association. The learned trial Judge also found that the suit has been filed by the plaintiffs to dupe money of defendant No.2 Society [present appellant]. Learned trial Judge, however, granted injunction on the ground that there is serious dispute about the procedure followed for recovering the amount under the Bombay Land Revenue Code. As the learned Judge found that no notice for recovery of the amount as arrears of land revenue has been issued as provided under the Land Revenue Code, straight away property could not have been auctioned. Learned Judge found that even though there is some force in the submission that there is collusion between defendants No. 1 to 5, whether the procedure under the land revenue code is followed or not is in dispute and on the aforesaid ground, the learned trial Judge granted injunction in favour of the plaintiffs by which defendant No.2, which is dealing in banking business has been prevented from auctioning the disputed property in order to recover its dues for the purpose of recovering the alleged amount.

3. Being aggrieved by the aforesaid order of the learned trial Judge, the appellant Society-original defendant No.2 has filed this Appeal from Order challenging the aforesaid order.

4. Learned advocate Ms. Qureshi appearing for

the appellant vehemently submitted that the present plaintiffs have instituted the suit in order to help the original borrower, who has tried to dupe the appellant Society after taking loan. It is further submitted that at the time of taking loan, the original borrower Jitendra Gajjar had already mortgaged the flat in question in favour of the appellant Society and therefore the loan was given to him. It is submitted that assuming that the present respondent No.1 -original plaintiff, might have already paid the amount to Jitendra Gajjar, that would not mean that the original plaintiffs have got any title over the suit property. It is submitted that the learned trial Judge himself having found that there is collusion between the plaintiff and defendants No. 1 and 5, he has committed an error in granting injunction on the ground that there is dispute as to whether the procedure under the Land Revenue Code is followed and that such disputed questions are required to be considered at the time of trial.

5. Learned advocate for the appellant also further submitted that the trial Court has no jurisdiction to grant injunction and proper remedy available to the plaintiffs was to approach the Debt Recovery Tribunal and Civil Suit is barred under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [for brevity, 'Securitisation Act', hereinafter]. It is submitted that the appropriate remedy available to

the original plaintiffs is to approach the Debt Recovery Tribunal. It is further submitted that at the time of giving loan to the original borrower: Jitendra P Gajjar, defendant No.1 of the suit, the flat in question was already mortgaged by the said borrower by executing a registered document. In that view of the matter, the learned trial Judge could not have granted the injunction especially when the learned trial Judge himself has come to a conclusion that there is collusion between the appellant and defendants No. 1 and 5. It is submitted that the appellant Society is denied of its just dues and the Society has not been paid its just dues by the original borrower-defendant No.1, and it is clear that the plaintiffs have filed the suit in order to see that the property is not auctioned. It is submitted by learned advocate that by virtue of decree passed by the Board of Nominees under the Co-Operative Societies Act, the appellant decree holder can execute the said decree as per the procedure prescribed under the Land Revenue Code and on the basis of decree passed by the Board of Nominees, notification is issued by the District Collector granting permission to auction, and, the District Registrar has also issued certificate for auctioning the suit premises. In view of the same, the Civil Court ought not to have interfered by granting injunction. She further submitted that subsequently notice has also been issued under the provisions of the Securitization Act, and therefore also, now the Civil Court has no jurisdiction. She further

submitted that since notice under the Securitization Act is given the proper remedy now for the appellant is to go before the Debt Recovery Tribunal, and in view of the notice under the Securitization Act, now the suit is also not maintainable.

6. Learned advocate Mr. Amin who is appearing for the original plaintiffs, i.e. respondents No. 1 and 2 herein submitted that at the time when the suit was filed, Securitisation Act was not in force but it came into force subsequently. He further submitted that it is true that the plaintiffs can now take out appropriate proceedings before the Debt Recovery Tribunal but he submitted that in such proceedings, interim relief is not granted by Debt Recovery Tribunal unless full amount is deposited. He submitted that in any case, the civil court has also jurisdiction to decide the suit wherein he is not required to pay amount at the time when the Court decides injunction application. Mr. Amin further submitted that the plaintiffs are the bonafide purchasers by paying full consideration to the original owner ie. Respondent No.3 in this appeal viz. Jitendra P Gajjar. Mr. Amin further submitted that if Jitendra Gajjar has defrauded the Society, the Society may take out appropriate proceedings against him in accordance with law.

7. Learned advocate Ms. Pahwa appearing for the original borrower i.e. respondent No. 3 herein has submitted that her client has taken a loan and that

out of the total loan amount, her client has paid Rs.10 lakhs and her client's six flats are already in possession of the appellant Society and according to her, now her client, the original borrower is not required to pay any additional amount to the Society as the Society can recover its dues by auctioning or selling the flats which are already in their possession.

8. On behalf of the original defendant No.5 Ninad Non Trading Association, an affidavit is filed before this Court. The affidavit is filed by Administrator the said Non-Trading Association who is the developer of the flat in question. In paragraphs 2, 3, 4 and 5 of the affidavit it is stated as under:-

> "2. From the Daftar of the Society it clearly transpires that all the documents placed on record or being relied upon by Mr. Deepak Chandulal Mistry, the opponent no.1 in the present appear from order, with respect to Flat No. 301 are concocted and forged and do not form part of the Daftar.
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> 3. The said Mr. Mistry is not a allottee as per Development Agreement and Condition N. 11. He is not a member of the Non-trading Association from 09.12.1997 and onwards. The Share Certificate sought to be relied upon by him to establish his claim is not issue from the

Original Book of Share Certificates of the Association. The signature of V.R. Shah and C.V. Shah appears to be forged. Mr. C.V. Shah has filed his affidavit in this respect confirming the same.

4. It appears that Mr. Mistry and his mother Mrs. Ramaben Chandulal Mistry have indulged in such fraud and forgery as a part of their personal transaction with some third person. The seal is also forged.

5. All the documents were forged in order to establish their claim, filed a suit No. 2256/2000 and get injunction so as to maintain their illegal possession."

9. As per the stand taken by the said Non-Trading Association, respondent No.1, original plaintiff has never been allotted the flat in question by the said Non-Trading Association nor he is a member of the non-trading Association and the share certificate is also not issued from the original book of share certificate of the Association. It is also the stand of the Association that the signature as well as the seal have been forged by the plaintiffs – respondents No. 1 and 2 herein.

10. It is required to be noted that large amount of loan of the appellant Society is outstanding from

original borrowers for which the appellant Society has already taken action for attachment of property. Even the learned trial Judge has observed as under in paragraph 8 as under:

> “8. In view of the rival submission and pleadings it is required to be considered whether the injunction can be confirmed or not. The documents are produced with the list Exh. 25 and in particular the possession letter at mark 25/1 dated 28.08.99 issued in favour of Shri Jitendrakumar Gajjar the owner or the proprietor of defendant No1 the letter at mark 25/3 addressed by said Jitendrakumar to defendant No.2 Society and the Resolution passed by defendant No. 5 Ninad Non Trading Association that she suit flat No. 301 is given by way of security by Shri Jitendrakumar Gajjar and he will not transfer the suit flat in any name. The resolution is dated 17.12.99. In Lavad Suit before the Board of Nominee it has not been brought on record that it has been already transferred in the name of the plaintiff. The plaintiff claims the possession on the basis of documents produced t mark 4/4 dated 9.12.97 and the possession letter at mark 4/3 which is dated 22.09.99. It is rather curious as to how the defendant No.5 could have issued such two certificates in favour of two different persons particularly when defendant No. 5 has passed the Resolution dated 17.12.99 that it is in the name

of Shri Jitendrakumar Gajjar and it is given by way of security for the advance from the defendant No.2 Bank. Therefore, it is evident that there is some force in the submission made by learned Advocate Shri S.J. Bhatt regarding collusion between the plaintiff herein and defendant No.1 and 5. It is also required to be mentioned that the defendant No.1 and 5 or atleast defendant No.5 could have brought to the notice that the suit flat has been transferred by Shri Jitendrakumar Gajjar though the Resolution has been passed to give by way of security to the Society but it has not been brought on record nor any such application has been given and now the present suit is sought to be filed by the plaintiffs claiming the possession and much reliance has been placed on the judgment of the Hon'ble High Court of Gujarat reported in 1995 (2) G.L.R. p. 1369. There is no quarrel with regard to the proposition that the person in actual possession without title would be entitled to protect his possession by virtue of doctrine of possessory title. However, it has also been observed while examining other provisions in the facts of that case that while litigation is going on between the parties which is not concluded it will affect the legality or the otherwise of the transaction but that would not affect the possession of the plaintiff given under the Sale Deed. It may be noted that in the facts of the

present case, the possession is not by any such Sale Deed but it is by merely on allotment letter or the possession letter which has been given by the defendant No. 5 under suspicion circumstances and though defendant No. 5 ought to have known about this fact that the order was passed in Lavad Suit by the Board of Nominee they have not brought on record anything and now the suit has been filed by the plaintiffs to dupe the money or the financial assistance granted by the defendant No.2 Bank. Therefore, in the facts of the present case, the judgment reported in 1995 (2) G.L.R. p. 1369 would not apply.

However, the another aspect regarding the auction of the suit flat is required to be considered. The judgment and decree passed in Lavad Suit before the Board of Nominee would entitle the defendant No. 2 Society to proceed for recovery as arrears under the Land Revenue Code after following the procedure. As there is a serious dispute that no such procedure has been followed and it appears prima facie that for recovery as arrears under the provisions of Land Revenue Code, the notice is required to be issued as provided in the Land Revenue Code which has not been served. The learned Advocate for the plaintiff Shri Acharya has strenuously submitted that straight way the auction is sought to e held and he has also disputed about

even holding of auction. The learned Advocate Shri Acharya appearing for the plaintiff has referred to the documents produced with the list Ex. 32 to support the submission that he is a bonafide purchaser for which the payment has been made. The Certificate of Dena Society is produced at mark 32/1. Therefore, there is some force in the submission that there is a collusion between defendant No. 1 and 5 but the fact remains that the disputed questions require further evidence which can be led at the trial. Moreover, the procedure as provided under the Land Revenue Code before the auction sale has been followed or not is disputed. The document at mark 25/7 produced by defendant No. 2 on the contrary suggest that the judgment and decree is required to be executed for recovery as arrears of land revenue. It also suggests that the Certificate is required to be given which again requires the issuance of notice under the Land Revenue Code. As there are serious disputes about even following this procedure, the injunction, in my opinion, deserves to be confirmed considering the balance of convenience and comparative hardship. If the injunction as prayed for to protect the possession is not granted the plaintiff would be non suited once the suit flat itself is permitted to be sold away by auction and on the other hand if the injunction is confirmed and ultimately it is found that the contentions raised by the

plaintiff are not acceptable or there is collusion between defendants No. 1 and defendant No. 5 as suggested by defendant No.2 then it can be brought on record at the time of trial of the suit by evidence. It is not permitted to be sold by auction at this interim stage the defendant No. 2 may proceed with the sale. It may be mentioned that the recovery may be delayed but at the same time the defendant No. 2 Society also ought to have remained more careful like insisting for deposit of share certificate and other safeguards."

11. It is interesting to note that original defendant No.5, Non-Trading Association, has not appeared before the trial Court but in view of the observation in the order passed by the trial Court about collusion, affidavit is filed before this court to explain the correct facts. Learned advocate for the Association has also pointed out that the said Association has never issued any certificate in favour of the original plaintiffs at all.

12. It is not in dispute that the flat in question was already mortgaged by the original borrower to the present appellant and thereafter decree was passed by the Board of Nominees in favour of the appellant. Even the Non-Trading Association has also passed resolution on 14.12.1999 by which it was resolved that till the dues of the present appellant is recovered, the said flat is not to be

transferred or name of any one should be entered in the record. Considering the aforesaid aspect of the matter, in my view, the trial Court was not justified in granting injunction restraining the appellant Society from auctioning the flat in question on the ground that whether the proceedings under the Land Revenue Code is followed or not is in dispute and is required to be considered at the trial. It is, as such, not in dispute that there is already a decree in favour of the appellant against the original borrower who had mortgaged the flat in question to the appellant. Respondents No.1 and 2 could not have got a better title than the original borrower. Under the circumstances, the appellant was justified in taking action for auctioning the flat for the purpose of recovering its dues. It is not in dispute that the appellant Society had already taken the flat in question in mortgage in order to secure its dues and ultimately in order to recover its dues, it proceeded to auction the property in question. Even as per the affidavit-in-reply filed by the respondent Non-Trading Association, the plaintiffs have tried to forge certain documents. The said affidavit is not even controverted by the original plaintiffs by filing any counter affidavit. Now, in view of section 34 of the Securitisation Act, the civil court cannot entertain the suit and primafacie the suit is not maintainable. It is not possible for me to accept the submission of Mr Amin that even though alternative remedy of approaching the Debt Recovery Tribunal is available, the Tribunal normally do not

give interim relief. This argument cannot be taken into account when the appellant has got remedy of approaching the Tribunal in view of the Securitisation Act. The present appellant cannot be restrained from taking proper proceedings in accordance with law to recover its dues and since it is not in dispute that the original borrower has mortgaged the flat in question to the appellant and in order to recover the amount, the Society has certainly got right to auction the flat for recovering its dues. Learned advocate Ms. Pahwa has submitted that her client has now nothing to do with the flat in question. She further submitted that now her client is not required to pay any further amount. This question, however, is not required to be decided in the present proceedings. Learned advocate for the appellant has submitted that the appellant has also taken out criminal proceedings against the original borrower as well as the present plaintiffs. However, this question is also not relevant for this Court in the present proceedings but suffice it to say that when the learned trial Judge has himself found that there is collusion between original plaintiffs and defendants No.1 and 5, the trial Court has committed error of law in granting injunction simply by holding that whether the procedure for auctioning the property under the Bombay Land Revenue Code is properly followed or not is in dispute and the same is required to be considered at the trial.

12. In my view, when it is not in dispute that

the disputed flat was already mortgaged in favour of the appellant Society by the original borrower and when there is a decree for recovering the amount which is passed by Court of Board of Nominees, the appellant cannot be prevented from acting further in accordance with law to recover its dues. Considering all these aspects, the order of the trial Court deserves to be set aside as in the facts of the case, injunction as granted by the trial Court could not have been granted. The appeal is accordingly allowed. The impugned order dated 17.10.2003 passed by the learned Judge, City Civil Court, Ahmedabad below Notice of Motion in Civil Suit No. 1147 of 2003 is quashed and set aside. The injunction application submitted by the original plaintiffs, respondents No. 1 and 2 herein, stands dismissed.

13. The appeal is accordingly allowed. No order as to costs.

14. It is clarified that it will be open to the appellant to approach the Debt Recovery Tribunal and if the appellant takes out any such proceedings, the observations made by this Court in this judgment may not come in the way of the appellant as this observations are made only in order to decide the interim injunction application and the same is to be treated as tentative observations.

15. At this stage, Mr. Amin submitted that the present order may be stayed for a period of one month

in order to enable his client to take appropriate proceedings before the Debt Recovery Tribunal or to carry the matter to the Supreme Court. Considering the said prayer, execution and implementation of this order is stayed upto 10th December 2006.

[P. B. MAJMUDAR, J.]

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